Editor's note: pages 285 and 286 were transposed in the original (They have been placed in the proper order but the original pagination has not been changed); appealed -- aff'd, Civ.No. 83-1148 (D.Idaho June 19, 1984)

DALE M. WRIGHT
v.
JEAN L. GUIFFRE

IBLA 82-729 Decided November 17, 1982

Appeal from decision of Administrative Law Judge Robert W. Mesch dismissing a private contest against desert land entry Idaho 331.

Affirmed as modified.

1. Desert Land Entry: Generally -- Rules of Practice: Private Contests

   Where the charges in a private contest complaint against a desert land entry are not corroborated as required by 43 CFR 4.450-4(c), the complaint must be dismissed.

2. Desert Land Entry: Generally -- Rules of Practice: Private Contests

   A private contest against a desert land entry that is initiated prior to the expiration of the statutory life of the entry and charges that the entryperson will fail to meet the requirements of the law by the expiration date is premature. Since time remains for the entryperson to fulfill the requirements, it cannot be said with certainty that the contestant has alleged facts which if proved would require cancellation of the entry and thus the contest must be dismissed.

APPEARANCES: William F. Ringert, Esq., Boise, Idaho, for appellee/contestee Jean L. Guiffre; Terry Lee Johnson, Esq., Twin Falls, Idaho, for appellant/contestant Dale M. Wright.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Dale M. Wright has appealed the decision of Administrative Law Judge Robert W. Mesch, dated March 15, 1982, dismissing his private contest complaint against the desert land entry of Jean L. Guiffre, Idaho 331.

On February 13, 1981, Wright filed a contest complaint with the Idaho State Office, Bureau of Land Management (BLM), pursuant to 43 CFR 4.450 seeking the cancellation of Guiffre's desert land entry and a preference right of entry for himself to the land covered by the Guiffre entry. 1/ Guiffre timely answered and denied the allegations in the complaint relating to the invalidity of her entry. A hearing was held before Administrative Law Judge Mesch on September 29, 1981, in Boise, Idaho. Judge Mesch thereafter dismissed the complaint because it was premature and because the grounds for contest were either of record with BLM or would in the normal course of events become of record. On appeal, Wright disputes both of these findings.

Under the provisions of 43 U.S.C. § 329 (1976), desert land entries are subject to private contest "as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law." Departmental regulation 43 CFR 4.450-1 provides:

> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the Act of May 14, 1880, as amended (43 U.S.C. 185), or the Act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein. n2

See also 43 CFR 2521.8.

Wright filed his complaint 3 days prior to the expiration of time for Guiffre to comply with the requirements of the desert land law as to reclamation and cultivation of the land. 3/ The charges made by Wright in his complaint, as summarized by Judge Mesch, are:

1/ Desert land entry Idaho 331 covers the NW 1/4, N 1/2 SW 1/4, SE 1/4 SW 1/4 of sec. 32, T. 9 S., R. 13 E., Boise meridian, Twin Falls County, Idaho.

2/ 43 U.S.C. § 185 (1970) (repealed by sec. 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, except as to Alaska) granted a preference right-of-entry to successful homestead contestants. The Department has long interpreted the language of 43 U.S.C. § 329 (1976) referring to the homestead laws as affording a similar preference right to successful contestants of desert land entries. 43 CFR 2521.8(b). See Fraser v. Ringgold, 3 L.D. 69 (1884).

3/ The application for the desert land entry at issue was originally filed by Emery L. Wiser on Nov. 1, 1966, and the entry allowed on Feb. 16, 1968. Final proof was due on Feb. 16, 1972. Wiser applied for an extension of time to make final proof in January 1972 that was granted on Feb. 18, 1972, pursuant to 43 U.S.C. § 333 (1976), making final proof due Feb. 16, 1975. In November 1974, Wiser applied for a second extension that was granted on Apr. 10, 1975, pursuant to 43 U.S.C. § 334 (1976), making final proof due Feb. 16, 1978.

BLM approved assignment of the entry to Guiffre (nee Jean L. Marshall) on Dec. 1, 1976. On Feb. 6, 1978, she applied for a third and final 3-year extension that was granted Mar. 31, 1978, pursuant to 43 U.S.C. § 336 (1976). Final proof was due Feb. 16, 1981.

> 1. Local officials of the BLM erred in granting extensions of time for the submission of final proof in that (i) the first extension was granted after the statutory life of the entry had expired, and (ii) the second extension was granted after the first extension had expired.
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> 2. The contestee will not be able to show final proof of irrigating the land in the entry by the 16th day of February, 1981, the time for the submission of final proof as extended by a third extension of time.
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> 3. The contestee has a conditional permit to appropriate water which requires any well to be cased with unperforated casing in order to prevent interference with surface flows, and the well will not be cased to the required depth by February 16, 1981.
>
> 4. The existing water system of open ditches is not feasible in that the water to be appropriated will not reach the entry with sufficient volume to effectively irrigate the land.
>
> 5. The necessary easements have not been obtained.

(Decision at 3). At the hearing the parties agreed that the facts and basis for the first charge were shown by BLM records and the charge was dismissed (Tr. 9). 4/ As to the remaining charges, Judge Mesch held that they must be dismissed because they could not have been decided when the complaint was filed and therefore were premature and based on conjecture, and because they involved matters that would of necessity have been considered by BLM in evaluating the final proof on the entry and, therefore, would in the normal course of events be shown by the records of BLM (Decision at 4). He explained these rulings as follows:

> A distinction must be drawn between grounds of contest that raise issues that can be determined when the complaint is filed, i.e., a charge of fraud in the inception of the entry or abandonment of the entry, and grounds of contest that raise issues that cannot be determined until the statutory life of the entry has expired, i.e., a charge in the second year of a four-year entry that the required one-eighth portion of the land has not been or will not be irrigated as required by the Desert Land Law. In the first illustration, a contest could properly be initiated at any time after the facts supporting the charge came into existence, and, in appropriate cases, immediately after the application to make

4/ The complaint also alleged that Guiffre was not without fault, as required by 43 U.S.C. § 336 (1976), in causing delay of the irrigation works on the entry, pointing out that when the third time extension for making final proof was granted to Guiffre she had not applied for a permit to appropriate ground water from the State of Odaho, Department of Water Resources. The parties also agreed to the dismissal of this charge at the hearing because the facts were of record with BLM (Tr. 9).

> an entry had been approved by the BLM. In the second illustration, it would not be proper to permit the initiation of a contest until the statutory life of the entry had expired and the facts supporting the charge came into existence. Until that time, there would not be any issue to decide, and when the life of the entry expired, the facts might not support the charges in the premature complaint. It would make a mockery of the preference right of entry accorded a successful contestant and result in the wholesale filing of private contests that could not be heard and decided, if one could contest an entry at any time, including immediately after the approval of the application to make an entry, on charges that could not be determined until the life of the entry had expired. I can see no reason to draw any distinction between filing a complaint three days or three years prior to the expiration of the life of an entry where there are no facts in existence at that time to support the charges in the complaint.
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> If a contest could be initiated prior to the existence of the facts supporting the charges, and on the basis solely of conjecture, then it would certainly seem proper, in applying the restriction in 43 CFR 4.450-1 relating to matters not shown by the records of the BLM, to judge the merits of the complaint as of the time it is filed on the basis of whether the conjectural charges would, in the normal course of events, be shown by the records of the BLM.

(Decision at 3-4).

On appeal Wright argues that Judge Mesch's decision was too narrow in scope and that this case is distinguishable from those where the charge is failure to cultivate which might be accomplished on the last day. Wright states:

> Certainly the case at bar, where the issue was whether or not the water delivery system * * * was capable of carrying sufficient water contained facts that could have been shown and adjudicated upon at the time of the filing of the complaint and especially at the time of the actual hearing thereon. There is no rule, statute, or specific case law that holds that all contests filed prior to the expiration of the entry period would be premature as not allowing the entry person his full time under the law to comply with the legal requirement. Cultivation of required amount is an obvious case but a promoted irrigation system with proved up water permits, which grossly over-burden the system without adding additional water for a new entry, certainly is subject to adjudication at any time during the entry period especially where the entry person refuses to acknowledge the problem and makes no effort whatsoever to cure either before the expiration of the period or after. (Tr. PP. 54-62)

(Memorandum in Support of Appeal, filed May 3, 1982).

Wright contends that the facts produced at the hearing supported the grounds set forth in the complaint -- that Guiffre did not show final proof of the entry's irrigation by the deadline and that the existing water system could not carry sufficient water to effectively irrigate the entry. He argues that this is not a case where the entryperson had plenty of time between filing of the complaint and the deadline for final proof to correct the deficiency and that in this case Guiffre had no intention of changing her system and, in fact, did not do so.

As to whether the allegations in his complaint were of record with BLM or would have become of record, Wright claims that at the time he filed his complaint and at the time of the hearing BLM was not aware of the fact that the irrigation system being relied upon was inadequate. Wright admits that BLM became aware that the system had not been hooked up and that water had not been placed on the entry, but asserts that BLM remained ignorant of the fact of the inadequacy of the system but for his complaint and the hearing that followed.

Wright complains that Judge Mesch's reasoning leads to the conclusion that BLM, in reaching a determination as to whether an entryperson has met the requirements of the desert land law, will always have all of the facts and always make the right determination. He points out that the reason for the preference right is "specifically to reward parties who come forward with information that is not yet of record with BLM and would potentially not become of record." He adds that there is nothing in the regulations regarding when a contest may be filed. He concludes that he should be given his due reward of a preference right for bringing forth evidence showing that Guiffre could not supply water to the entry because the system was already used for other purposes and would be overburdened by supplying her entry as that information was not of record with BLM at the time of his complaint.

In response, Guiffre urges that Judge Mesch's decision be affirmed. She urges that she was entitled to the full time permitted by statute to perfect her entry, that she was diligently doing so when Wright filed his comlaint, and that the charges in the complaint were based on conjecture and speculation, and not fact. Guiffre contends that the evidence shows that the irrigation system she was using was adequate.

Guiffre challenges Wright's argument that the issue of the adequacy of her system would not have come of record. She notes that, where pumping is relied upon for irrigation, 43 CFR 2521.6(f) requires a showing that there is sufficient capacity to make water available to all irrigable lands and thus BLM is obligated to determine the adequacy of the irrigation system in the normal course of evaluating final proof.

Guiffre also argues that at the time Wright filed his complaint, he had not developed his theory that the capacity of the system she was relying on to irrigate was inadequate and did not know the facts that he used to support the theory until investigating in preparation for the hearing. She contends that the charge was not included in the complaint nor corroborated in the

affidavit supporting the complaint. 5/ Furthermore, she suggests that the capacity of the system was necessarily adjudicated by BLM in conjunction with its approval of her revised plan of irrigation prior to the filing of the complaint.

The purpose of the preference right is to encourage the elimination of unlawful homestead and desert land entries by private contest whereby a person who has no prior claim to the land acts as a "common informer" by instituting a private contest. McLaren v. Fleischer, 256 U.S. 477, 479 (1921).

The requirements for proceeding with a private contest are well-established. A contest charge to be adequate must allege facts affecting the validity of an entry that if proved would require cancellation of the entry, and the Department has consistently held that a complaint is properly dismissed if it fails to do so. Lamb v. Stoffel, 36 IBLA 201 (1978); Wadsworth v. Anhder, 70 I.D. 537 (1963). Also, a charge that states only a conclusion and is not supported by facts is defective. Eugene A. Whitmill, 34 IBLA 123, 125 (1978); Oxford v. McCoy, A-30603 (Oct. 6, 1966). Departmental regulation 43 CFR 4.450-4 requires that a private contest complaint contain "[a] statement in clear and concise language of the facts constituting grounds of contest" and corroboration by the statement of witnesses under oath of those facts. Under 43 CFR 4.450-5(a), a contestant's failure to comply with these requirements results in summary dismissal. The regulatory requirements are designed to screen out those cases in which the contestants have no substantial evidence on which to base their charges against an entry. Lamb v. Stoffel, supra at 208.

By regulation and in its case law, the Department has also determined that a contestant may not validly base a contest against a homestead or desert land entry upon allegations of fact which are shown in the official records of BLM because the legislative purpose of the preference right would hardly be served by a contestant's informing BLM of what it is already aware. Lamb v. Stoffel, supra at 207 and note 4; Christie v. O'Glesbee, 23 IBLA 155 (1975); 43 CFR 4.450-1. See also Wadsworth v. Anhder, supra.

Although the parties have directed their arguments in part to the validity of the Guiffre entry, the primary issue presented in this appeal is the sufficiency of Wright's complaint based on the principles just set forth.

In her brief following the hearing, Guiffre moved to dismiss the contest on several grounds including Wright's failure to corroborate his charges as required by the regulations. Although Judge Mesch did not rule on the issue

5/ The capacity of Guiffre's irrigation system was put in question by the sole and specific allegation that the ditches could not transport sufficient volume to effectively irrigate the land. However, review of the hearingtranscript and briefs before Judge Mesh and on appeal reveals tht in additon to the the adequacy of the ditches, Wright presented considerable evidence and arguement directed to the capacity of Guiffre's pumps. Since Wright did not raise the issue of the pumps in his complaint or move to amend the complaint, he is thereafter barred from doing so under 43 CFR 4.450-4(b) and (e).

of corroboration, we are constrained to address it before turning to his decision.

[1] The record reflects that no corroboration was submitted for any of the charges made in the complaint except for the charge that the well casing required by Guiffre's conditional permit to appropriate water would not be completed to required depth on February 16, 1981. As corroboration, Wright submitted the affidavit of L. Glen Saxton, an employee of the Idaho Department of Water Resources, who attested that he was familiar with the permit issued to Guiffre and the circumstances of its approval and that he had reviewed Wright's complaint and could affirm the allegations set out in that charge as they relate to the permit. Affidavit in Support of Complaint, dated February 13, 1981. He attached a copy of the permit and related documents to the affidavit. BLM had received a copy of Guiffre's permit documents from the Department of Water Resources on December 8, 1980. Therefore, the fact of the permit and its requirements were clearly of record with BLM when Wright filed his complaint and were not by themselves a proper ground for contest.

Saxton's affidavit did not refer to the part of this charge alleging that the casing would not be timely completed, set forth any facts to support the charge, or even suggest that Saxton was in any way familiar with the circumstances. The applicable regulation, 43 CFR 4.450-4(c), states that the facts alleged in the complaint must be corroborated by a statement of at least one witness "having personal knowledge of the alleged fact and such fact must be set forth in the statement." (Emphasis added.) See Bolton v. Inman, 46 L.D. 234 (1907); William Dittman, A-27312 (June 25, 1956). In absence of any statement of facts concerning completion of the well casing, the corroboration of the charge must be found insufficient.

In view of the insufficiency of the corroboration which was submitted and the absence of any corroboration of the other charges, Wright's complaint should have been summarily dismissed by BLM pursuant to 43 CFR 4.450-5(a), and we modify Judge Mesch's decision to do so.

[2] In his statement of reasons for appeal, Wright asserts that there is no regulatory statement with respect to the timing of a private contest complaint in 43 CFR 4.450 and argues that his complaint was not premature. We recognize that there is no regulatory provision on this issue, but a review of Departmental case law provides guidance for evaluating Wright's complaint. In determining the acceptability of a complaint, the Department has distinguished between charges involving fixed requirements of entry and charges involving requirements that are susceptible of fulfillment over a period of time. In the latter case, the complaint consistently has been found premature when filed before the period of time has run. The basis for this distinction is that since there remains time in which the entryperson could meet the requirement, the contestant has not alleged facts which, if proved, would require cancellation of the entry.

Thus, a complaint filed after the end of the second year of a homestead entry alleging that the entryman had not satisfied the requirements of the homestead law that not less than one-sixteenth of the acre of the entry

be cultivated beginning with the second year is proper. Charles Lewellen, 70 I.D. 475 (1963), aff'd, Darling v. Udall, Civ. No. 474-64 (D.D.C. Oct. 5, 1964). However, a charge in a complaint filed during the second year must be dismissed as premature. Clayton v. Ocheltree, 43 L.D. 379 (1914); Darling v. Lewellen, A-30885 (June 13, 1968). A charge that the homestead entryman did not properly post his entries to give public notice of its location is acceptable, whereas a charge that the entryman has not established residence upon the land within 6 months of recording his location notice when the 6 months had not run is not acceptable. Scheele v. Dockery, 68 I.D. 100 (1961). Accord Brunette v. Phillips, 22 L.D. 692 (1896); De Haven v. Gott, 18 L.D. 144 (1894). A contest charging a desert land entryman with failure to make the annual expenditures required by the desert land law and thus putting in issue the truth of the annual proof submitted by the entryman is not premature when brought prior to the expiration of the time allowed for final proof because the law requires annual compliance. Bradley v. Vasold, 36 L.D. 106 (1907); Julian v. Harding, 31 I.D. 10 (1901). A contest against a desert land entry on the ground of nonreclamation is premature if the statutory life of the entry has not expired. Vradenburg's Heirs v. Orr (On Review), 25 L.D. 533 (1897); White v. Dodge, 21 L.D. 494 (1895). But a contest may be brought at any time charging that the entryperson does not have an adequate source of water supply as required by the desert land law for entry. Mullin v. Keaster, 44 L.D. 161, 169 (1915). 6/

Wright's complaint provides a new twist to this analysis. Instead of alleging that a particular requirement of law had not been fulfilled on the day he filed his complaint, Wright has attempted to predict the failure of Guiffre by alleging that certain requirements would not be met on the day the entry expired. The problem with such a charge is that, even if the contestant does prove that, as of the day he filed his complaint, based on evidence available at that time, the requirement could not be met by expiration of the entry, there still remains the possibility that circumstances might change or unknown facts come to light which would enable the entryperson to meet the final proof requirement. 7/ Thus it cannot be said with certainty that the contestant has alleged facts which, if proved, would require cancellation of the entry. It makes no difference whether the time remaining is very short or not. Although it may be less likely that an entryperson could cure a deficiency when only a few days are left to the entry, the fact remains that a contestant's charges represent allegations as to conditions on the day filed and must be proved as of that day. What is evident from a review of the record and pleadings in this case is that Wright sought to speculate as to Guiffre's potential for failure and then offer as proof the fact that what he charged came to pass. The preference right is a reward for uncovering fraud,

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6/ We would note that although a contest may be brought at any time charging that an entryperson's water supply is inadequate, an entryperson is not prohibited from changing the stated source of water for the entry during the life of the entry. The requirement is simply that the entryperson must have rights to an adequate supply at all times.

7/ We suggest that evidence presented by a contestant in these circumstances might even aid the entryperson in identifying deficiencies at a time when they could still be cured.

abandonment, or failure to comply with the law, not for predicting an entryperson's failure to make final proof. Even if Wright could prove with acceptable evidence that Guiffre on February 13, 1981, could not have timely obtained easements, fixed the ditch system, completed the well casing, and irrigated the land, she still must be given the full life of her entry to attempt to do so because each of those requirements was susceptible of accomplishment on the last day of the entry. Wright's complaint was premature, and Judge Mesch properly dismissed it.

The unacceptability of the charges is also demonstrated by the difficulty in evaluating them against the regulatory requirement that the basis of the contest be "any reason not shown by the records of BLM." 43 CFR 4.450-1. The regulation is usually very simply applied. When a complaint is filed, examination of BLM's records is made to determine whether BLM knows already what is being alleged. See, e.g., Christie v. O'Glesbee, supra. In this case, BLM should have examined its records to determine if it knew on February 13, 1981, that Guiffre, by February 16, 1981, would not have irrigated her entry, would not have completed the well casing, would not have a sufficient ditch system, and would not have obtained necessary easements. In all probability the result was that BLM did not know these matters, and the charges, therefore, met that regulatory requirement. The requirement, however, is meaningless when applied to a matter which need not have yet occurred. More than likely such matters would never be of record with BLM because BLM would not concern itself with them until the entry expired. Contrary to Wright's assertion on appeal, this does not mean that there can never be a proper charge because BLM would always become aware of all possible grounds for denying the entry when adjudicating final proof. See Wadsworth v. Anhder, supra at 539. Rather, it illustrates that the purpose of the regulation is entirely defeated in the circumstances where the time has not run for fulfilling a requirement which a contestant alleges will not be fulfilled.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Mesch is affirmed as modified.

Will A. Irwin
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge